No. 91-1108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

1. The fundamental question presented here—whether a board of realtors may require membership in the board as a condition for gaining access to its multilist service—has been the subject of federal antitrust review and private litigation for 20 years. The petition demonstrates that every federal and state court (save California) to have considered the issue has ruled that local boards may require membership so long as membership requirements are reasonable and non-discriminatory. See Pet. 13-16. The decision below squarely conflicts with these decisions. Of the many Realtor cases discussed in the petition, respondents address only one—*Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127, 130-31 (5th Cir. 1989)—and offer no persuasive basis for distinguishing that case. Respondents also ignore the fact that, after more than a

decade of intensive scrutiny by the United States Department of Justice resulting in significant revisions to multilist policies, the government has never required a single board to abandon its membership requirement. Pet. 17. These facts alone provide compelling reasons to grant the petition.

Apart from attempting to distinguish some of the cases cited by petitioners, respondents' only other proffered ground for denying the petition is the interlocutory posture of the case. But that is no basis for denying review in this case. First, as respondents themselves expressly concede, the decision below, if left undisturbed, will have an immediate national impact. Referring to "any other Realtor-affiliated MLS," respondents admit that, under the decision below, "[i]f such a group does possess market power, then the MLS *should* change its practices . . . ." Opp. 21. There is thus no dispute that the Eleventh Circuit's decision potentially affects every board in the country that operates an MLS. See Pet. 25. The *amicus* briefs submitted by the National Association of Realtors (NAR) and by the American Society of Association Executives (ASAE) and five prominent national professional and business associations underscore the need for immediate review of the conflict created by the decision below.

Second, this is not a case where the disputed facts are material to the legal question before this Court. The legal issue here is whether an association whose membership requirements are reasonable and non-discriminatory violates the Sherman Act if it offers its services only to its members. As the petition demonstrates, the facts needed to resolve that question are undisputed. *Id.* at 2-3 & n.1. Indeed, a trial on the only disputed issue mentioned by the respondents—whether the multilist service has market power—would at best be a waste of judicial and private resources, because the definition of market power imposed by the Eleventh Circuit is itself erroneous. *Id.* at 21-23.

2. The grounds for review that respondents have either ignored or conceded therefore are themselves sufficient for granting the petition. Respondents make several additional points, most of which attempt to distinguish some of the cases cited in the petition. None of them have merit.

First, respondents attempt to distinguish this case from *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898), because in those cases, "organizations required only membership in their own group" whereas here plaintiffs are required to join "a separate organization altogether." Opp. 2.[1] Respondents' argument turns on the fact that the DeKalb Board offers its multilist service through a wholly owned subsidiary. *Id.* But petitioners' corporate structure, while significant for tax purposes, has no legal significance for the antitrust question presented here. Indeed, in one of the cases that squarely conflicts with the decision below, the court expressly noted but ascribed no relevance to the fact that the multilist service was "set up" for tax purposes "as a wholly owned subsidiary" of the local board. *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 113 (E.D.N.Y. 1988).

The reason that this is a distinction without a difference is plain. Respondents' claims would not be affected one bit if, tomorrow, the DeKalb Board decided to offer the multilist service directly rather than through a wholly owned subsidiary. Respondents would still have to join the DeKalb Board in order to gain access to the multilist service, and thus would still have to pay dues to support

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[1] Respondents also suggest that *Anderson* is distinguishable because it was decided prior to the Court's adoption of its current understanding of interstate commerce. But the Court's decision turned not on an outdated conception of interstate commerce but on its analysis that an association's enforcement of reasonable membership requirements could not have any harmful effect on commerce, however defined. *See* 171 U.S. 604, 616-20 (1898).

the various non-multilist services that they claim they do not want. See Opp. 3-5. In short, plaintiffs are in the same position as a competing news organization who wanted access to the news AP distributed but not to other benefits of AP membership, or a livestock trader who wanted access to the exchange but did not want to be a member of the traders' association.

The irrelevance of petitioners' corporate structure to the antitrust question presented is underscored by the *amicus* brief filed by the ASAE, *et al.* That brief demonstrates that the holding below is not limited to cases involving wholly owned subsidiaries and conflicts with other association cases outside the real estate context. See ASAE *Amicus* brief at 9-10 (demonstrating conflict with *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 188 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973), and *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986)).

Second, respondents argue that this case is distinguishable from the Fifth Circuit's decision in *Pope*, 872 F.2d at 130-31, because there the Fifth Circuit's inquiry was "'limited to determining whether the present [Realtor] fee schedule is reasonable.'" Opp. 7 (quoting 872 F.2d at 130). But it was only because the Fifth Circuit followed the *Associated Press* test—which asks whether the membership requirements are reasonable and nondiscriminatory—that the Fifth Circuit could then reach the dispositive, narrower question of whether the fees required for membership were in fact "reasonable." 872 F.2d at 130. See *Pope* v. *Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 269-72 (N.D. Miss. 1988) (three pages of analysis addressing "critical legal question . . . whether requiring board membership to participate in MLS satisfied the 'rule of reason'"); 872 F.2d at 130 (threshold finding that membership requirement itself not necessarily unlawful because "[i]f properly admin-

istered, membership requirements serve pro-competitive purposes").

Thus, if this case had arisen in the Fifth Circuit, the only question before the court would have been whether the membership requirements were reasonable and non-discriminatory. Given the undisputed facts that (1) annual board membership dues are $275.00, and (2) at all times relevant to this lawsuit, the board has accepted every application for Realtor membership submitted to it, the district court correctly granted summary judgment to petitioners. See Pet. 2-3 & n.1., 7 n.8. The conflict between the contrary decision of the court of appeals and *Pope* is thus irreconcilable.

Third, respondents argue that the decision below imposes no burden on petitioners because it "leaves them with at least two options" that are less restrictive than the current system. Opp. 9-10. The argument misses the fundamental point of the petition. The question is not whether less restrictive alternatives exist. Petitioners have conceded that here, as in almost any case, plaintiffs and judges can point to alternatives that are "less restrictive." The question instead is whether the standard for determining whether an association's membership rules violate the Sherman Act is a least-restrictive-means test. See Pet. 18-19. Respondents do not dispute that three circuits have expressly rejected that test in rule-of-reason cases, see *id.*, which is reason enough to grant the petition.

Fourth, on the tying claim, respondents concede that the analysis in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), conflicts with the decision below, but argue that *Wells*' "analysis is simply erroneous" in light of this Court's decision in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984). Opp. 12-13. The allegation that the First Circuit incorrectly applied *Jefferson Parish* to the question whether associa-

tions engage in tying when they offer services only to members, however, simply underscores the need for review on the merits. That need is further underscored by the fact, which respondents simply ignore, that one district court outside the First Circuit has expressly relied on the First Circuit's allegedly erroneous analysis in reaching a result that squarely conflicts with the result here. See Pet. 20.

Respondents next argue that "[t]he mere existence of multiple Realtor boards in the Atlanta area, any one of which will satisfy Metro's requirement, suggests that there is no one-to-one tie between the product offered by Metro and the product offered by DeKalb." Opp. 14. But this observation itself casts doubt on the validity of the tying analysis below. It is a strange tie indeed where the defendant is not always the seller of the tied product. The fact that board membership serves procompetitive rather than pecuniary ends is further underscored by the fact that 35% of multilist services *not affiliated* with NAR nevertheless require membership in a Board as a precondition to multilist service. NAR *Amicus* brief at 7-8. At a minimum then, respondents and petitioners agree that this is *not* the sort of arrangement that this Court or any court has previously condemned as a tie-in.

Fifth, respondents fail to distinguish the conflict between the Eleventh Circuit and the Second and Ninth Circuits on the question whether good will can ever be an "entry barrier" sufficient to demonstrate market power. Respondents contend that the decision below did no more than hold that " 'there is a material question of fact as to whether the defendants have the necessary market power.' " Opp. 15 (quoting Pet. App. 18a) (emphasis omitted). But in so holding, the court of appeals reversed the district court's holding that there was no genuine dispute over market power because there were no entry barriers. To reverse that judgment, the court of appeals held, as a matter of law, that proof of "an in-

surmountable amount of good will" is sufficient to establish entry barriers and thus market power. Pet. App. 18a. Respondents' subsequent explanation of the good will argument, that "pre-existing loyalties of the present members of Metro, and the near impossibility of persuading the membership generally to abandon Metro and its critical mass of listings," (Opp. 16) confirms that respondents' argument here is precisely the same argument that was rejected by the Second and Ninth Circuits. See *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984); *United States* v. *Syufy Enters.*, 903 F.2d 659, 669 (9th Cir. 1990).

Finally, respondents defend their argument that a membership requirement that satisfies the rule of reason under *Associated Press* may nevertheless constitute a tie-in. The tension inherent in that argument is not worthy of review, they claim, because "[p]etitioners provide no relevant citation to a court of appeals' decision so holding." Opp. 18. That objection misses the point: Both this Court and one court of appeals have expressly recognized that it is the nature of the alleged restraint—and not the label—that matters for purposes of Section 1. Pet. 23. Tying analysis has long been a source of confusion in antitrust jurisprudence,[2] and the need to ensure that tying analysis is consistent with the rest of the Court's Section 1 jurisprudence has been recognized by individual members of this Court as well as by various courts of appeals. See *id.* at 24.

3. In sum, the petition demonstrates that the decision below conflicts with numerous lower court and state court decisions as well as with decisions of this Court. The brief in opposition does not persuasively distinguish these conflicts, and it confirms that the decision is of immediate importance to boards and associations throughout the

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[2] *Compare, e.g., Fortner Enters., Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969) *with United States Steel Corp.* v. *Fortner Enters., Inc.*, 429 U.S. 610 (1977).

country. The antitrust question presented is therefore one of national importance that this Court should resolve.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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